82-565

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No. _____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

JEFFREY R. MACDONALD, *Petitioner*
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Defendant Dr. MacDonald (petitioner here) was charged with the murder of his wife and infant children. No motive was shown and the prosecution's case was based solely upon a hypothetical reconstruction of the crime. Defendant's account was that the crime was committed by intruders (three men and a woman) under the apparent influence of drugs. In support of his testimony, he tendered the out-of-court admissions made to seven different persons by a woman (Helena Stoeckley) implicating herself as a participant in the crime. The admissions, freely made by a person who answered a description given by Dr. MacDonald and who was admittedly unconnected with him, were corroborated in numerous particulars. They were excluded, however, on the ground that the declarant, who claimed loss of memory at the trial, was a drug addict and an unreliable and "pathetic" person.

The following questions are presented:

1. Whether the courts below misconstrued and misapplied Rule 804(b)(3) of the Federal Rules of Evidence (providing in pertinent part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the *statement*" (emphasis added)), in concluding that there was discretion to exclude the Stoeckley admissions because she was an unreliable *person*.

2. Whether the exclusion of the Stoeckley admissions violated the "fundamental [right of the] accused to present witnesses in his own defense," *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

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Jeffrey R. MacDonald petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 16, 1982.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported. The opinion of the district court denying bail pending appeal (Appendix C, *infra*) is reported at 487 F.Supp. 1087.[1]

[1]Other opinions issued during the course of these proceedings relate to the issue, discrete from that raised in the instant petition, whether Dr. MacDonald was denied the right of a speedy trial. These opinions are reported at 531 F.2d 196, reversed 435 U.S. 850, and at 632 F.2d 258, rehearing denied, 635 F.2d 1115, reversed 102 S. Ct. 1497.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on August 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF EVIDENCE INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . .

Rule 804 of the Federal Rules of Evidence provides in pertinent part:

> (b) *Hearsay exceptions.* — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * *
>
> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[2]

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[2]Subsection (a) of the Rule provides that unavailability as a witness includes situations in which the declarant "testifies to a lack of memory of the subject matter of his statement."

STATEMENT

Factual Background

In February 1970, Dr. Jeffrey R. MacDonald was a 26-year-old Army captain serving as a medical officer at Fort Bragg, North Carolina. He lived with his wife and two infant daughters. In the early morning hours of February 17, Mrs. MacDonald and the two children were murdered. Each had suffered multiple stab wounds and beatings with a club. Dr. MacDonald himself was found to have seventeen wounds, including a life-threatening stab wound of the chest which caused a partial lung collapse.[3] Dr. MacDonald's account to the military police shortly after their arrival on the scene, repeated at trial, was that the household was attacked by four intruders, three men and a woman. One of the men was described as a black male wearing an army-type field jacket with sergeant stripes. The woman was described as a blond female wearing a floppy hat, boots and a short skirt and possibly carrying a candle. He further stated that the woman had held a candle or flickering light during the attack on his person.

A local police officer, Beasley, hearing the descriptions, concluded that the woman in question might be Helena Stoeckley, a young drop-out who was involved with drug users and cultists and served him as an informer. The description of costume fit her, she used a blond wig, and she associated with a black male who habitually wore a jacket of the kind described by Dr.

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[3]When the military police arrived at the MacDonald home in response to Dr. MacDonald's call for help, he had lapsed into unconsciousness.

MacDonald. Beasley promptly confronted Stoeckley and she made her first admission of involvement.[4]

The crime was subsequently investigated extensively by the military authorities and Dr. MacDonald was exonerated pursuant to detailed findings of the investigating officer that he was innocent and that there was sufficient evidence to require an investigation of Stoeckley by civilian authorities.

Subsequent to Dr. MacDonald's honorable discharge from the military the Department of Justice reinstituted the investigation. Approximately five years after the crime, it secured an indictment. Dr. MacDonald moved to dismiss on the ground that he had been denied the right to a speedy trial. The district court denied the motion, the Fourth Circuit reversed on appeal (531 F.2d 196), and this Court in turn reversed the court of appeals, holding that defendant's appeal from the denial of his motion was premature.

Trial finally took place in the summer of 1979. Dr. MacDonald, testifying in his own behalf, gave a detailed account of an attack by four intruders who were obviously under the influence of drugs.[5] The defense also called

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[4]We discuss *infra* the particulars of her admissions and the numerous facts and circumstances that provide corroboration.

[5]In our brief on the merits, last term (October Term, 1980, No. 80-1582), we provided a detailed summary of Dr. MacDonald's version of the crime. For purposes of this petition, so full an account does not appear necessary. We do advert below to some particulars of Dr. MacDonald's account of the crime, as he gave it to the military police and the trial court, in explaining the corroboration that there was for Stoeckley's admissions. For the Court's convenience, we have also reprinted in Appendix D, *infra*, the summary of Dr. MacDonald's testimony that we included in our brief in No. 80-1852.

Helena Stoeckley. She testified as to her background and she recalled where she had been at midnight of February 17, 1970 and at 5:00 a.m. of that day when she returned to her apartment. She claimed, however, that she had blacked out all recollection of the critical five hours between. The defense then tendered the testimony of seven different persons — law enforcement officers, friends and acquaintances — all of whom testified on *voir dire* to admissions made to them by Stoeckley. The trial judge ruled that none of this evidence might be heard by the jury.

The government, for its part, disclaimed any ability to show that Dr. MacDonald had motive to commit the crimes, relying solely upon the discovery and analysis of various items of physical evidence at the scene. Its theory was that various aspects of petitioner's story were inconsistent with the physical evidence, and that Dr. MacDonald had inflicted his own wounds and staged evidence of an intrusion by outsiders as a cover for his own crimes. Ultimately, then, the case came down to an evidentiary clash between Dr. MacDonald's account and the government's hypothetical reconstruction of the crime.[6]

The Stoeckley Admissions

The day after the crime, Police Officer Beasley approached Helena Stoeckley and told her that "You and these people you are with fit the description that was

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[6]Following Dr. MacDonald's conviction, a second appeal was taken. The court of appeals reversed on speedy trial grounds without disposing of other issues raised by defendant. 632 F.2d 258. The government's petition for certiorari was granted and this Court reversed, remanding the cause for consideration of the remaining issues presented by the appeal. 102 S. Ct. 1497.

given out." Stoeckley hung her head and responded, "In my mind, it seems that I saw this thing happen," adding that she was "heavy on mescaline." (J.A. 1222-23)[7]

Several days after the murders, Stoeckley told her neighbor, William Posey, that she held the light during the commission of the crimes, but that she, herself, would not kill anybody. She named the street (Honeycutt) where she believed she had been seen by a policeman on the morning of the crime. She also said that she observed a "hobby horse thing" in the MacDonald home and that "it was broke or something, it wouldn't move." (J.A. 1240-41)

During the months following her removal to Nashville in late 1970, Stoeckley discussed her involvement with four persons in that city (witnesses Zillioux, Underhill, Gaddis and Brisentine).

She told Jane Zillioux, a woman who had befriended her, that she could not return to Fayetteville because she had been involved in murders there. She provided details: she had worn her white boots and blond wig on the night of the crime; she was afraid the wig would be ruined because it rained heavily; she subsequently got rid of those items despite her fondness for them; she was in the company of three males the night of the crime, and "was with them for the drugs." Describing the scene in the MacDonald home, she stated, "So much blood. I couldn't see or think of anything except blood . . . I asked the boys to take me home. I had to get

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[7]All of the witnesses to the Stoeckley admissions testified on *voir dire*. None of them was permitted to testify before the jury concerning those admissions. "J.A." references are to the joint appendix prepared for the court of appeals. Additional portions of the transcript of record are denoted as "Tr."

home." She also asked Zillioux not to repeat what had been said. (J.A. 1178-83)

Another Nashville friend, Charles Underhill, testified that Stoeckley told him, while she was in a state of emotional distress, "They killed her and the two children. . . . They killed the two children and her." (J.A. 1197-98)

Stoeckley confided to James Gaddis, a Nashville police officer to whom she was providing information concerning drug traffic, that she had been at the scene of the MacDonald murders and knew who had committed them. She said that one of the participants to whom she referred had a blue Ford Mustang. (J.A. 1189-91)

CID investigator Brisentine interviewed Stoeckley in Nashville in April, 1971. She told him that she thought she had been present during the MacDonald murders but that she had not actively participated in the homicides. She remarked that it had not started to rain hard until after the murders. Questioned further on this point, she replied, "I have already said too much." At one stage of the interview, she offered to reveal names of the participants and the circumstances surrounding the killings if granted immunity from prosecution. Brisentine also recalled that "she knew about the blood on the bed." (J.A. 1202-1209, 1215) She also told him that "the hippie element was angry with Dr. MacDonald as he would not treat them by prescribing methadone for their addiction to drugs." (J.A. 1203)

During the trial Stoeckley was visited by Wendy Rouder, one of defendant's trial counsel, in the wake of a report that Stoeckley had been assaulted. (J.A. 1257) In the course of the ensuing conversation Stoeckley acknowledged that she had "a memory" of "standing at the couch [in the MacDonald home] holding a candle. . . ." Responding to a question from Rouder as to whether she

had ever lost her sense of guilt concerning the MacDonald murders, she replied, "No, what do you think I have taken all these damn drugs for?" (J.A. 1262, 1265) Asked why she would not state her recollections in court, Stoeckley replied, "I can't with those damn prosecutors sitting there." (J.A. 1265)

Corroboration of the Stoeckley Admissions

Both Dr. MacDonald and Stoeckley testified without contradiction that they had never seen one another or had any connection prior to the crime. The descriptions given by Dr. MacDonald to military police on their arrival at the scene were nonetheless sufficient to alert a local policeman to the likelihood that Stoeckley and her associates were involved. This she admitted to Beasley.

Stoeckley has repeatedly acknowledged that on the night of the crime she wore a blond wig and boots, both of which she destroyed two days later. (J.A. 1095-96) Moreover, in those days she wore her floppy hat "all the time." (J.A. 1092)

Consistent with Dr. MacDonald's account of a flickering light held by the woman, Stoeckley has repeatedly recalled holding a candle while present in the MacDonald home. Wax drippings were found on the premises and none of them matched candles of the type found in the household. (Tr. 3834-45)

Sergeant Mica, one of the military police who answered Dr. MacDonald's call for help on the morning of February 17th, observed a woman with a floppy hat standing on the corner of South Lucas and Honeycutt Road as he drove to the MacDonald residence shortly before 4:00 a.m. (Tr. 1450-52) In her conversation with her neighbor Posey, Stoeckley named Honeycutt as the street where she had been seen by an officer on the morning of the crime.

Stoeckley had been seen by her neighbor Posey as she returned to her apartment at about 4:30 on the morning of February 17th.[8] Posey testified that there were at least two other persons in the car and that the car was a blue Mustang. (J.A. 1493-95) Compare Stoeckley's statement to Officer Gaddis that one of the men responsible for the MacDonald murders had a blue Mustang.

The MacDonald household contained a "hobby horse thing," as also stated by Stoeckley in her conversation with Posey. (J.A. 1115-16, 1240-411)

Neither Stoeckley nor any other witness has been able to provide an innocent explanation of Stoeckley's whereabouts and activities between the critical hours of midnight and 4:30 or 5:00 a.m., although Stoeckley was admittedly abroad and with several soldiers during that period.

As recounted by Stoeckley in her admissions, blood was profuse in the MacDonald apartment following the crimes. Also, as she said, there was "the blood on the bed" — the words "Kill the pigs" written in blood on the headboard of the bed in the master bedroom. (Tr. 1934-35)

In his account, Dr. MacDonald referred to comments made by the female intruder, such as "acid is groovy" and "kill the pigs." Language of this kind was part of Stoeckley's idiom in 1970. (J.A. 1027-28, 1155, 1400) At the time Stoeckley was deeply involved in the

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[8]Stoeckley, herself, testified at the trial that she left her apartment at around midnight and came back at about 4:30 or 5:00 a.m., February 17. She claimed on the stand that she had no recollection where she had been in the intervening hours. She did say that she arrived home in a blue car and in the company of three soldiers. (J.A. 1040, 1046-48)

drug culture and associated with "hippies," drug users and soldiers, some of whom were hiding from the authorities. (J.A. 1012-15, 1386-87) She was also involved in witchcraft and had engaged in the ritual sacrifice of animals. (J.A. 1034-36, 1244-45)[9]

The Opinions Below

The district judge stated that he was excluding the Stoeckley admissions because he believed that she was a "pathetic figure" suffering the effects of habitual use of drugs. (App. 34a) He also observed that she had vacillated, that some of her statements were equivocal, and that in her conversations with her auditors she had sometimes been "'hysterical', 'crying' and 'blubbering'." (*Ibid*) He concluded that she would be "of no help." (*Ibid*)

The principal opinion of the court of appeals (Bryan, J.) recognizes that Stoeckley was unavailable as a witness within the meaning of Rule 804 and that there were various circumstances (some of which it set forth) corroborating her out-of-court admissions against penal interest. It concluded, however, that "[g]iven the declarant's pathetic appearance," the district judge had not exceeded his discretion in excluding her admissions.

Judge Murnaghan, concurring, expressed "strong uneasiness" with the result. (App. 24a) Quoting the Notes

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[9]On the day of the funeral for members of the MacDonald family, Stoeckley placed wreaths outside her home. She put on a long black dress and wore a black veil over her face. (Testimony of Posey, J.A. 1498-99) According to Stoeckley, black is "[u]sually for doing harm to someone." (J.A. 1037) She also testified that followers of witchcraft use a candle for illumination because of "a belief that the Devil is afraid of any kind of artificial light. . . ." (J.A. 1038)

of the Advisory Committee, he stated that Rule 804(b)(3) was designed to meet the danger of a trumped-up confession instigated by a defendant. The danger of fabrication, he said, was not present in the instant case. "MacDonald and Stoeckley were not in any way acquainted." (App. 23a) There was corroboration of the admissions, and Stoeckley's habits and life style supported, rather than detracted from, the defendant's account.[10] For all of the reasons that he noted, Judge Murnaghan's view was that "the testimony should have been admitted" and that "MacDonald would have had a fairer trial" if it had been. (App. 24a) "In the end," however, Judge Murnaghan was not prepared to say that the district court had abused its power. (*Ibid*)

REASONS FOR GRANTING THE WRIT

The courts below have construed and applied the provision of the Federal Rules of Evidence governing the admissibility of admissions against penal interest in a manner that departs from its terms and subverts its purpose. The approach taken conflicts with that taken by other courts of appeals and raises a grave constitutional question. The effect, we submit, was to deprive the defendant of the "fundamental [right] . . . of an accused to

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[10]In this connection, Judge Murnaghan stated (App. 22a):

> Helena Stoeckley was shown to be a person of no fixed regularity of life, roaming the streets nocturnally at or about the time of the crimes, dressing in a bizarre fashion, and capable of so short-circuiting her mental processes through an indiscriminate taking of drugs that (a) she could well accept her presence and, to some extent, her involvement in the MacDonald murders and (b) she could become so separated from reality that, on the fatal evening, she was ripe for persuasion to participate.

present witnesses in his own behalf" as recognized by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Finally, this case involves a dire threat of an unjust conviction. Helena Stoeckley is the only person, apart from the defendant, who has given an eye witness account of the crime. Her words alone could provide direct confirmation of his testimony. Despite persuasive corroboration of Stoeckley's admissions that she was present and a participant in the crime, the jury was deprived of opportunity to assess their weight. No one can say that it would have reached the same result had it heard her admissions. We urge that in these circumstances this Court has a special obligation to review the issues of law presented and to give plenary consideration to the necessity of a new trial.[11]

I.

THE DEMANDS OF RULE 804(b)(3)

A. The Rule 804(b)(3) exception "rests on the assumption that persons will not make damaging statements against themselves unless they are true." 4 *Weinstein's Evidence* 804-90 (1979) However, even where the declarant's statement is, on its face, against interest, there is a possibility of fabrication. The declarant may have taken the risk of accusing himself in order to exculpate another who is more vulnerable to prosecution.

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[11]The "strong uneasiness" that this case generates (Judge Murnaghan's words) is heightened by the fact, widely reported in the news media, that since the trial Stoeckley has confirmed the truth of her admissions and provided added detail. In these post-trial statements, she has expressly acknowledged that, because of fear of confronting the authorities, she lied on the witness stand when she denied recollection of what occurred during the critical hours.

Or, a more likely occurrence, "A" may pretend to have heard a self-accusatory declaration by "B", who is unavailable to testify, in order to assist "C" who stands accused of the crime in which "B" has allegedly admitted involvement.

Because of the danger "of a trumped-up confession by a professional criminal or some person with a strong motive to lie" (*Weinstein, supra,* 804-103), Congress imposed, in the second sentence of the Rule, a requirement of corroboration: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." As stated by the Advisory Committee on the Rules (of which Judge Weinstein was a member), the "requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." Advisory Committee Notes, Fed. R. Evid. 804(b)(3).[12]

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[12]The Advisory Committee also stated (*ibid*):

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States,* 228 U.S. 243, 33 S. Ct. 449, 57 L.Ed. 829 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. [Citations omitted] The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations.

As noted above there has never been any suggestion or claim that Helena Stoeckley had any connection to Dr. MacDonald or any conceivable motive to fabricate on his behalf.

In short, the guarantee of trustworthiness, as with other exceptions to the hearsay rule, is circumstantial.[13] In the case of a declarant's admission offered to exculpate an accused, two sets of circumstances provide the basis of admissibility: first, that the statement is against the declarant's penal interest; second, that extrinsic facts provide corroboration of the *contents of the statement*. The "Rule refers to the trustworthiness of the statement, not of the declarant. . . ." *United States v. Satterfield*, 572 F.2d 687, 692 (9th Cir. 1978). If these two conditions are satisfied, it is immaterial, from the standpoint of admissibility, that the declarant is a person of bad habits or character or generally unreliable. By definition, he who speaks against penal interest is himself a wrongdoer. Moreover, the concerns that prompted the Advisory Committee to add, and Congress to amend, the requirement of corroboration presuppose the danger of unreliability of the person making, or the person testifying with respect to, the alleged statement.

Explaining the Rule's approach, Judge Weinstein provides the following illustration (*Weinstein, supra*, 804-104, 105):

> If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

Although the corroboration in the instant case goes far beyond that suggested in the preceding example,

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[13]As noted in *United States v. Evans*, 635 F.2d 1124, 1126 (4th Cir. 1980), the "more general Fed. R. of Evid. 804(b)(5) similarly requires 'equivalent circumstantial guarantees of trustworthiness.'"

the trial judge denied the jury the opportunity to hear Ms. Stoeckley's admissions because he considered her a person of bad habits and unreliable character, a "pathetic" figure who used drugs excessively. Quite apart from other considerations, this reflects a basic misconception of the Rule's requirements. Stoeckley's admissions plainly "tended to subject" her to criminal liability and they were powerfully corroborated in numerous particulars.[14] It follows, without more, that they were admissible and that the defendant was entitled to have the

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[14]Judge Weinstein has stated (*Weinstein, supra,* 804-104) that a court should ask "sufficient corroboration to 'clearly' permit a reasonable man to believe that the statement might have been made in good faith and that it could be true." Louisell and Mueller, 4 *Federal Evidence* 1159 (1980)) state that "[c]ertainly the requirement [of corroborating circumstances under Rule 804(b)(3)] should be considered satisfied by evidence independent of the statement itself which tends either directly or circumstantially to establish a matter asserted by the statement. . . ," citing *United States v. Thomas,* 571 F.2d 285, 290 (5th Cir. 1978), *United States v. Atkins,* 558 F.2d 133, 134-136 (3d Cir. 1977), and *United States v. Goodlow,* 500 F.2d 954, 958 (8th Cir. 1974). All three of these cases are irreconcilable with the case at bar.

The federal courts have spoken in various terms of the degree of corroboration required by the Rule, *e.g.,* that the standard goes beyond "minimal corroboration" but is not "so strict as to be utterly unrealistic" (*United States v. Barrett,* 539 F.2d 244, 253 (1st Cir. 1976)); that admissibility is made out if the corroboration is "substantial" (*United States v. Mock,* 640 F.2d 629, 632 (5th Cir. 1981)); that the circumstances should "clearly corroborate the matter asserted in the declarant's statement" (*United States v. Satterfield,* 572 F.2d 687, 692 (9th Cir. 1978)). As shown in the Statement, the circumstances corroborating the Stoeckley admissions fully satisfy any standard that has been suggested. As pointed out below in our discussion of *Chambers v. Mississippi,* 410 U.S. 284 (1973), admissibility is also mandated by the Constitution.

jury assess their significance and weight. Indeed, it would be a grave perversion of justice, as well as of the Rule, to deny to a defendant the opportunity to introduce the exculpatory and corroborated statements of the party admitting guilt merely because he or she is an unworthy or untrustworthy person. Certainly, one who is entitled to the presumption of innocence and who contends, as Dr. MacDonald did at his trial, that he was victim rather than perpetrator cannot be charged with the burden of proving that his assailants are of good and reliable habits and character and have been unswerving in making admissions against interest. Victims do not enjoy the option of selecting their assailants.[15] If Dr. MacDonald's account of the crime is true, it was a virtual certainty that the actual perpetrators would prove to be users of drugs and persons of disturbed, if not depraved, character.

B. Although we believe that the trial court plainly erred in deciding the Rule 804(b)(3) issue on the basis of its assessment of Helena Stoeckley's habits and character, we point out additionally that those factors, even if they could properly be deemed relevant to the court's function as distinguished from the jury's, do not bear the weight that the trial judge placed upon them.

The trial judge stressed Stoeckley's drug habit. In the first place, we note that Dr. MacDonald's account of the crime identified the female intruder as a person who

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[15]We know of no case in which the court found adequate circumstantial corroboration of a declaration against penal interest, yet denied admissibility because of doubts concerning the habits or character of the declarant. The few cases that make note of any such doubts (*e.g., United States v. Alvarez*, 584 F.2d 694, 701-702 (5th Cir. 1978); *United States v. Poland* 659 F.2d 884, 895 (9th Cir. 1981)) are marked by unequivocal determinations that circumstantial corroboration was deficient.

was on drugs, attributing to her such statements as "Acid is groovy." That aspect of his identification is confirmed by her habit.

Secondly, we point out that one who makes use of drugs can neither be deemed incapable of making truthful statements[16] nor disqualified as a declarant or a witness (see *United States v. McRary*, 616 F.2d 181, 182 (5th Cir. 1980); Fed. R. Evid. 601. The trial judge did not question Stoeckley's competency as a witness on the stand. Indeed, he complimented her on answering "intelligently" the questions put to her. (J.A. 1030) It is inconceivable that the government would have refrained from using, or that any court would have rejected, Stoeckley's admissions had she been a defendant and made the claim that she was a long-time user of drugs.

Thirdly, with few exceptions, there is no evidence to indicate that Stoeckley was under the influence of drugs on the specific occasions that she made admissions.[17]

The trial judge also emphasized the fact that Stoeckley, although she repeatedly made admissions over the course of a decade, has intermittently retreated from her self-incriminatory statements. This, of course, is a

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[16]Officer Beasley of Fayetteville and Officer Gaddis of Nashville were two of the persons to whom Stoeckley made admissions. Both had employed her as an informant on drug matters. Beasley described her as the "most reliable informant I ever had" (J.A. 1221), and Gaddis as "the best informant I ever had" (J.A. 1539), noting that "the percentage of busts we made with her were about 90 to 95 percent correct" (*ibid*).

[17]Officer Gaddis testified that "most of the time when she [Stoeckley] gave me information about the MacDonald murders she was not" under the influence of drugs (J.A. 1192). Agent Brisentine thought that Stoeckley had taken drugs on one of two days that he interviewed her (J.A. 11210-11).

commonplace occurrence in cases arising under Rule 804(b)(3). The declarant who has made admissions against penal interest perhaps out of unwariness or temporary remorse, will not infrequently back away, particularly when summoned to the witness stand. He may assert loss of memory, claim privilege or simply recant, as in this Court's leading case involving such admissions, *Chambers v. Mississippi*, 410 U.S. 284 (1973). Indeed, it is the declarant's unavailability as a defense witness that provides the predicate for invocation of Rule 804(b)(3). In short, a statement against interest has probative force because it is a self-inflicted injury. It is not deprived of significance because of vacillation, subsequent regret, or emotional disturbance on the part of the declarant. If corroborated, it must be heard and it is the jury's function, not the trial judge's, to consider its weight in light of all the relevant circumstances.

In Stoeckley's case, the reasons for the vacillation are plausible and natural, as is evident from the *voir dire* testimony of her auditors. She was torn between a sense of guilt that persistently impelled her to make fragmentary and guarded admissions and a concern that she was getting herself in too deep. Witness, for example, her statements that "I have already said too much," her request for immunity as a condition of further disclosure, and her statement, made during the course of the trial, that she was withholding information because of "those damn prosecutors sitting there" (*supra* at 8).

II.

THE CONSTITUTIONAL ISSUE

"Clearly, the federal rule [804(b)(3)] is no more restrictive than the Constitution permits, and may in some situations be more inclusive," *United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976). In *Chambers v.*

Mississippi, 410 U.S. 284 (1973), this Court reversed a state court conviction because the trial judge, pursuant to state law, had denied the defense the opportunity to introduce the testimony of three witnesses who were prepared to testify to out-of-court statements made by one Gable McDonald admitting his own guilt of the shooting charged to Chambers.[18] "Few rights," the Court said (p. 302), "are more fundamental than that of an accused to present witnesses in his own defense."

Called to the stand by Chambers' counsel, Gable McDonald had repudiated his admissions of guilt. The defense was thereupon denied leave to show the substance of McDonald's oral statements by the testimony of those who had heard them. Ruling that this violated constitutional guarantees, the Court noted that the excluded testimony was "critical to Chambers' defense" (p. 302) and that the danger of its being perjured was negated by the following considerations (pp. 299–301): Gable McDonald's admissions had been made spontaneously shortly after the crime; each admission "was corroborated by some other evidence in the case"; the "sheer number of independent statements provided additional corroboration for each"; the declarant "stood to benefit nothing" by disclosing his criminal involvement; he "could have been cross-examined by the State, and his demeanor and response weighed by the jury."

Each of these factors has its counterpart here. Stoeckley's admissions were undeniably critical. As the court of appeals stated in its prior opinion finding that Dr. MacDonald was prejudiced by the denial of a speedy trial, "Had Stoeckley testified as it was reasonable to

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[18]The sole dissent in *Chambers* was on the ground that the constitutional issue had not been properly raised.

expect she might have testified, the injury to the government's case would have been incalculably great." 632 F.2d 258, 264. Her admissions began promptly after the crime. They were freely made. They were repeated in one form or another to seven different persons over the course of time. They were supported in numerous particulars by other evidence in the case. She stood to gain nothing by her disclosures. She was available for cross- examination by the government. It was essential, both under the Federal Rules and under the Constitution, that her words be heard and their credibility determined by the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

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September 1982